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9
10 IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

11 MICHAEL GRECCO
12 PRODUCTIONS, INC.,

13 Plaintiff,

14 v.

15 TIKTOK, INC.,

16 Defendant.

Civil Action No. 2:24-cv-04837-FLA-
MAR

**PLAINTIFF'S MOTION FOR
PARTIAL SUMMARY JUDGMENT**

(OPPOSED)

DATE: September 26, 2025

TIME: 1:30 P.M.

JUDGE: Fernando L. Aenlle-Rocha

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1 Plaintiff hereby moves for entry of partial summary judgment against
2 defendant TikTok, Inc. (“Defendant”), and states as follows:

3 **INTRODUCTION**

4 The Digital Millenium Copyright Act (“DMCA”) removal process is a
5 straightforward one: a notice is sent, the content is removed, the user is notified,
6 and an opportunity is given for counter-notice. Despite the DMCA providing a
7 one-track line, Defendant made itself the conductor and derailed clear procedure.
8 Plaintiff abided by the law to police and protect its property, while Defendant
9 determined it was appropriate to insert itself as the arbiter of fair use and opted to
10 not remove infringing content.

11 The law is clear: Defendant was not and is not afforded the right to make
12 these types of determinations—and certainly not *months* after DMCA notices are
13 sent as Defendant did here. The DMCA requires service providers, such as
14 Defendant, to adhere to strict guidelines upon notice of infringing content on its
15 platform. Defendant cannot have its cake and eat it too. After shirking its
16 responsibilities under the DMCA, Defendant now expects this Court to allow it to
17 avail itself to the safe harbor protection under the very statute it has defied. The
18 Court should decline to do so.
19
20

ARGUMENT

I. Legal Standard

Summary judgment is appropriate where “the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). “Material facts are those that may affect the outcome of the case.” See Changing World Films, LLC v. Parker, No. CV 22-9021-DMG (PVCx), 2025 U.S. Dist. LEXIS 5464, at *5–6 (C.D. Cal. Jan. 10, 2025) (referencing Nat’l Ass’n of Optometrists & Opticians v. Harris, 682 F.3d 1144, 1147 (9th Cir. 2012)). “A dispute about a material fact is ‘genuine’ if the evidence is such that a reasonable jury could return a verdict for the nonmovant.” Edge Sys. LLC v. Ageless Serums LLC, No. 2:20-cv-09669-FLA (PVCx), 2023 U.S. Dist. LEXIS 53267, at *6 (C.D. Cal. Mar. 28, 2023) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)).

“The moving party bears the initial burden of identifying relevant portions of the record that demonstrate the absence of a fact or facts necessary for one or more essential elements of each claim upon which the moving party seeks judgment.” Edge Sys. LLC v. Ageless Serums LLC, No. 2:20-cv-09669-FLA (PVCx), 2023 U.S. Dist. LEXIS 53267, at *5–6 (C.D. Cal. Mar. 28, 2023). “If the moving party meets its initial burden, the opposing party must then set out specific

1 facts showing a genuine issue for trial to defeat the motion.” Id. at 6. “Summary
2 judgment must be granted for the moving party if the nonmoving party ‘fails to
3 make a showing sufficient to establish the existence of an element essential to that
4 party’s case, and on which that party will bear the burden of proof at trial.” Id.
5 (quoting Celotex, 477 U.S. at 322).

6 **II. Plaintiff’s Takedown Notices Complied with the DMCA**

7 A service provider’s expeditious removal must follow the receipt of a
8 takedown notification from a copyright holder. “Section 512(c)(3)(A) sets forth the
9 elements that such a ‘takedown notification’ must contain. These elements include
10 identification of the copyrighted work, identification of the allegedly infringing
11 material, and, critically, a statement that the copyright holder believes in good faith
12 the infringing material ‘is not authorized by the copyright owner, its agent, or the
13 law.’” Lenz v. Universal Music Corp., 815 F.3d 1145 (9th Cir. 2016) (quoting 17
14 U.S.C. § 512(c)(3)(A)).

15 In this case, Plaintiff sent twenty-five (25) takedown notices to Defendant
16 via its designated DMCA email address: copyright@tiktok.com.¹ Each takedown
17

18 ¹ See the August 22, 2025 Declaration of Jonathan Alejandrino (the “Alejandrino Decl.”), at ¶ 3,
19 Exhibit A, at Boutros Tr. at 47:9-47:17; 53:13-53:17; 56:16-56:21; 57:14-57:19; 59:9-59:14;
20 60:5-60:9; 61:1-61:5; 62:6-62:11; 69:15-69:21; 70:18-70:23; 71:16-71:21; 72:16-72:20; 73:12-
73:16; 74:10-74:14; 75:7-75:11; 76:4-76:8; 76:24-77:3; 77:22-77:25; 78:16-78:20; 79:8-79:13;
80:6-80:10; 81:3-81:7; 81:25-82:4; 82:22-83:2; See the August 22, 2025 Declaration of Michael
Grecco (the “Grecco Decl.”), at ¶ 35.

1 notice contained the required information, including the identity of the copyrighted
2 work, the location of the infringing material, and a statement of good faith.²
3 Further, as required by 17 U.S.C. § 512(f), prior to each take-down notice being
4 sent to Defendant, Plaintiff (or an agent authorized to act on behalf of Plaintiff)
5 subjectively considered whether Defendant's user's use of each photograph was
6 fair use.³ Plaintiff and/or the agent authorized to act on Plaintiff's behalf
7 determined that each unauthorized use would not qualify as fair use.⁴ [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED].⁵ Moreover, Defendant admitted that it received Plaintiff's takedown
11 notices.⁶ Thus, the burden shifted and obligated Defendant to take the next steps
12 as required by the DMCA.

13 **III. Defendant Failed to Comply with the Requirement of the DMCA**

14 "Difficult and controversial questions of copyright liability in the online
15 world prompted Congress to enact Title II of the DMCA, the Online Copyright
16 Infringement Liability Limitation Act (OCILLA)." Ellison v. Robertson, 357 F.3d

18 ² Grecco Decl., at ¶ 36.

19 ³ Id., at ¶ 37.

20 ⁴ Id.

⁵ Alejandrino Decl., at ¶ 3, Exhibit A, at Boutros Tr. at 44:11-44:21.

⁶ Id., at ¶ 5, Exhibit C, No. 9-13.

1 1072, 1076 (9th Cir. 2004). “To that end, OCILLA created four safe harbors that
2 preclude imposing monetary liability on service providers for copyright
3 infringement that occurs as a result of specified activities.” UMG Recordings, Inc.
4 v. Shelter Capital Partners Ltd. Liab. Co., 718 F.3d 1006, 1014 (9th Cir. 2013). For
5 a “service provider” like Defendant to be protected under the safe harbor of
6 § 512(c), there are numerous requirements Defendant must have met (that it did
7 not). In relevant part, the statute provides that:

8 c) Information residing on systems or networks at
direction of users. —

9 (1) In general. — A service provider shall not be liable
for monetary relief, or, except as provided in subsection
10 (j), for injunctive or other equitable relief, for
infringement of copyright by reason of the storage at the
11 direction of a user of material that resides on a system or
network controlled or operated by or for the service
12 provider, if the service provider —

(A)

13 (i) does not have actual knowledge that the material
or an activity using the material on the system or
14 network is infringing;

15 (ii) in the absence of such actual knowledge, is not
aware of facts or circumstances from which
infringing activity is apparent; or

16 (iii) **upon obtaining such knowledge or**
awareness, acts expeditiously to remove, or
17 **disable access to, the material**

18 17 U.S.C. § 512 (LexisNexis, Lexis Advance through Public Law 119-20,
19 approved June 20, 2025) (emphasis added).

1 [REDACTED]
2 [REDACTED].⁷ Defendant admits that it did not remove the infringing
3 material for at least a year.⁸ In other words, [REDACTED], it failed
4 to expeditiously remove the infringing material. Even more appalling, Defendant
5 did not remove *any* of the infringing material after receipt of the takedown notices.
6 As of the submission of this motion, Defendant did not remove any unauthorized
7 display of the Work (as identified in Plaintiff's DMCA Takedown Notices) as a
8 result of the DMCA Takedown Notices.⁹ Defendant testified that eight
9 infringements identified in Plaintiff's DMCA Takedown Notices are no longer
10 displayed.¹⁰ However, Defendant *admits* that it is not the one who removed seven
11 (7) of the eight (8) infringing materials.¹¹ Moreover, the one that *was* removed by
12 Defendant was done so for an unrelated reason.¹² Without reservation, there is no
13 doubt that Defendant had knowledge or awareness of the infringements and
14 *deliberately* chose not to remove the infringements at all—let alone
15 expeditiously—as required by law.

16
17

⁷ *Id.* at ¶ 3, Exhibit A, at Boutros Tr. at 17:8-17:15.

18 ⁸ *Id.* at ¶ 5, Exhibit C, No. 9-13.

19 ⁹ *Id.* at ¶ 3, Exhibit A, at Boutros Tr. at 126:23-127:8; 58:12-58:25; 67:6-67:13

20 ¹⁰ *Id.* at ¶ 3, Exhibit A, at Boutros Tr. at 58:12-22.

¹¹ *Id.* at ¶ 3, Exhibit A, at Boutros Tr. at 58:12-58:25; 67:6-67:13; 106:5-106:25

¹² *Id.* at ¶ 3, Exhibit A, at Boutros Tr. at 106:5-106:25

1 After expeditious removal of the content that is the subject of the takedown
2 notification, and to avoid liability for disabling/removing content, the online
3 service provider must notify the user of the takedown. Lenz, 815 F.3d at 1151; 17
4 U.S.C. § 512(g)(1)–(2). After the service provider gives notice to the user of the
5 content’s removal, “[t]he user then has the option of restoring the content by
6 sending a counter-notification, which must include a statement of ‘good faith belief
7 that the material was removed or disabled as a result of mistake or misidentification
8’” Lenz, 815 F.3d at 1151 (quoting 17 U.S.C. § 512(g)(3)(C)). Again,
9 Defendant *failed* to remove the content that was subject of the DMCA takedown
10 notices. Thus, Defendant did not have *any* communication with *any* of its users
11 that posted infringing materials named in the takedown notices.¹³ Accordingly, the
12 users were not given any opportunity to provide a counter-notification and it goes
13 without saying that no such counter-notice was ever received by Defendant.
14 Defendant failed to comply with this step, as required by the DMCA. Defendant’s
15 misconduct—first originating with the failure to expeditiously remove and then
16 compounded by Defendant subjectively inserting its own judgment (a year later)
17 to not remove the photographs from its website/platform—served as an
18 impediment to the entire takedown process required by the DMCA.

19
20

¹³ Id. at ¶ 3, Exhibit A, at Boutros Tr. at 66:12-67:1.

1 Lastly, once the service provider receives a valid counter-notification, “the
2 service provider must inform the copyright holder of the counter-notification and
3 restore the content within ‘not less than 10, nor more than 14, business days,’
4 unless the service provider receives notice that the copyright holder has filed a
5 lawsuit against the user seeking to restrain the user’s infringing behavior.” *Id.*
6 (quoting 17 U.S.C. § 512(g)(2)(B)–(C)). Here, Defendant did not communicate
7 with Plaintiff to provide notice that the infringing materials would not be
8 removed.¹⁴ Additionally, Defendant failed to remove the work despite being served
9 the Complaint, which clearly sought an injunction to restrain the user’s infringing
10 behavior.¹⁵

11 Defendant’s conduct after receiving Plaintiff’s takedown notices can only
12 be described as a deliberate and consistent failure. The procedures laid out in the
13 DMCA are crystal clear about the steps a service provider is required to take after
14 receiving a takedown notice, yet Defendant failed to comply at every single step.

15 Notably, [REDACTED]

16 [REDACTED]¹⁶

17
18
19 ¹⁴ Grecco Decl. at ¶ 38.

20 ¹⁵ Complaint [D.E. 1]; First Amended Complaint [D.E. 23]; Second Amended Complaint [D.E. 46].

¹⁶ Alejandrino Decl. at ¶ 3, Exhibit A, at Boutros Tr. at 51:3-51:23; 64:2-64:12.

1 Rather than comply with the objective requirements of the DMCA,
2 [REDACTED]
3 [REDACTED].¹⁷ [REDACTED]
4 [REDACTED].¹⁸ In determining that the
5 photographs at issue should not be removed from its website/platform was a clear
6 contravention of the mandatory/objective nature of the DMCA. By doing so,
7 Defendant derailed the entire sequence of what the DMCA required of it. Because
8 Defendant did not expeditiously remove the content (or at all), Defendant did not
9 inform the users in this case that their content was removed/disabled. Because the
10 users were never informed that their content was removed/disabled, the users were
11 never able to respond with a counter notice. Because a counter notice was never
12 sent, Defendant never had to communicate with Plaintiff or comply with the
13 DMCA's "put-back procedures."

14 To avail itself to the safe harbor, Defendant was *required* to engage in
15 specific, *detailed* conduct. Defendant decided it would not do so. Defendant failed
16 to comply with the DMCA requirements and thus cannot be shielded from liability
17 for infringement.

18
19
20 ¹⁷ Id. at ¶ 3, Exhibit A, at Boutros Tr. at 19:23-20:5; 94:7-94:20; 111:21-112:4; 112:10-17;
125:23-126:8; 127:1-127:8

¹⁸ Id. at ¶ 3, Exhibit A, at Boutros Tr. at 19:23-20:5; 125:23-126:8; 127:1-127:8

1 **IV. Plaintiff is Entitled to Partial Summary Judgment on its Claim of**
2 **Secondary Liability for Copyright Infringement**

3 “Secondary liability for copyright infringement does not exist in the absence
4 of direct infringement by a third party.” A&M Records, Inc. v. Napster, Inc., 239
5 F.3d 1004, 1013 n.2 (9th Cir. 2001). Accordingly, for Plaintiff to establish
6 contributory copyright infringement, it must first establish that Defendant’s end-
users directly infringed.

7 **A. Elements of Copyright Infringement**

8 “To establish infringement, two elements must be proven: (1) ownership of
9 a valid copyright, and (2) copying of constituent elements of the work that are
10 original.” Menjivar v. JVCKenwood USA Holdings, Inc., No. CV 24-0448-
11 CBM(AJRx), 2024 U.S. Dist. LEXIS 71349, at *6 (C.D. Cal. Apr. 17, 2024)
12 (quoting Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991)).

13 **a) Ownership of a Valid Copyright**

14 **1. Photographs 1–7, 13–16, 18, 22**

15 “The Copyright Act provides that ‘[i]n any judicial proceedings the
16 certificate of a registration made before or within five years after first publication
17 of the work shall constitute prima facie evidence of the validity of the copyright
18 and of the facts stated in the certificate.’ 17 U.S.C. § 410(c) (emphasis added).”
19 Aquarian Found., Inc. v. Lowndes, 127 F.4th 814, 819 (9th Cir. 2025). When the
20 certificate of copyright registration constitutes prima facie evidence of

1 copyrightability, “the burden [shifts] to the defendant to demonstrate why
2 the copyright is not valid.” Bibbero Sys, Inc. v. Colwell Sys., Inc., 893 F.2d 1104,
3 1106 (9th Cir. 1990).

4 Here, Plaintiff published the specified photographs (The First Photograph,
5 Second Photograph, Third Photograph, Fourth Photograph, Fifth Photograph,
6 Sixth Photograph, Seventh Photograph, Thirteenth Photograph, Fourteenth
7 Photograph, Fifteenth Photograph, Sixteenth Photograph, Eighteenth Photograph
8 and Twenty-Second Photograph) comprising part of the Work and registered those
9 photographs within five years of first publication.¹⁹ Plaintiff owns the
10 photographs.²⁰ As a result, there is a presumption of a valid registration/protectable
11 elements.

12 **2. Photographs 8–12, 17, 19–21**

13 The Eighth Photograph, Ninth Photograph, Tenth Photograph, Eleventh
14 Photograph, Twelfth Photograph, Seventeenth Photograph, Nineteenth
15 Photograph, Twentieth Photograph, and Twenty-First Photograph were not
16 registered until later than five (5) years from first publication.²¹ The registration
17 certificate therefore does not constitute “prima facie” evidence of validity, but it
18

19 ¹⁹ Grecco Decl., at ¶ 40, Exhibit C.

20 ²⁰ Id. at ¶ 6.

²¹ Id. at ¶ 40, Exhibit C.

1 certainly is evidence enough to satisfy the first element of an infringement claim.
2 See Brighton Collectibles, Inc. v. RK Tex. Leather Mfg., No. 10-CV-419-GPC
3 (WVG), at *8 (S.D. Cal. Dec. 13, 2012) (“The Copyright Act allows the district
4 court the discretion to determine the evidentiary weight accorded to a certificate
5 when the only flaw is the passage of time. 17 U.S.C. § 410(c). Most courts
6 conclude that untimely certificates constitute prima facie evidence.”); Lifetime
7 Homes, Inc. v. Residential Dev. Corp., 510 F. Supp. 2d 794, 801 (M.D. Fla. 2007)
8 (“Although Plaintiff did not file the copyright registration within the five year time
9 period, Plaintiff has produced the certificate of registration for the Model A and
10 Defendants have not pointed to any evidence indicating that Plaintiff’s certificate
11 of registration is not valid. Further, Defendants make no argument nor present any
12 evidence to support a finding that Plaintiff does not in fact own the copyright for
13 the Model A plans.”). As succinctly explained in Southall v. Force Partners, LLC,
14 No. 1:20-cv-03223, 2021 U.S. Dist. LEXIS 164680, at *7 (N.D. Ill. Aug. 31,
15 2021):

16 The last sentence is crucial here: Section 410(c) confers
17 discretion on the court on how to treat a certificate
18 obtained five years after publication. In other words, the
19 statute mandates a presumption of validity for pre-five-
20 year certificates, but the statute does not *forbid*²² a
presumption of validity for post-five-year certificates.
Post-five-year certificates are still eligible to qualify as
prima facie evidence of a valid copyright. Yurman

²² Emphasis in original.

1 Design, Inc. v. Golden Treasure Imps., Inc., 275 F. Supp.
2 2d 506, 515-16 (S.D.N.Y. 2003) (holding that late
3 registrations can be considered prima facie evidence of
4 valid copyright); Telerate Sys., Inc. v. Caro, 689 F. Supp.
5 221, 227 n. 7 (S.D.N.Y. 1988) (explaining "[e]ven if the
6 certificate were ... issued more than five years after the
7 actual date of first publication, the court would be
8 inclined to give the certificate the weight of prima facie
9 evidence, as permitted under Section 410(c)."). ***In any
10 event, the strength of the presumption is not a matter
11 that should be resolved at the pleading stage. The
12 parties must develop facts in discovery before the
13 certificate's evidentiary weight can be presented to the
14 Court for decision.***²³ The copyright-infringement claim
15 survives.

16 Here, Plaintiff registered the specified photographs comprising part of the
17 Work pursuant to 17 U.S.C. § 411(a) with the Register of Copyrights as set forth
18 above.²⁴ Plaintiff owns the photographs.²⁵ Additionally, Defendant has not
19 produced any evidence to challenge Plaintiff's registration/ownership of a valid
20 copyright.²⁶

21 "Some minimal degree of creativity," or "the existence of ... intellectual
22 production, of thought, and conception" is required for copyright protection. JCW
23 Investments, Inc. v. Novelty, Inc., 482 F.3d 910, 914–15 (7th Cir. 2007)
24 (quoting Feist Publications, Inc., 499 U.S. at 362). "[T]he requisite level

25 ²³ Emphasis added.

26 ²⁴ Grecco Decl., at ¶ 40, Exhibit C.

27 ²⁵ Id. at ¶ 6.

28 ²⁶ Alejandrino Decl. at ¶ 3, Exhibit A, at Boutros Tr. at 93:10-93:12.

1 of creativity is *extremely low*; even a slight amount will suffice. The vast majority
2 of works make the grade quite easily, as they possess some creative spark, no
3 matter how crude, humble or obvious it might be.” Feist Publ’ns, Inc., 499 U.S. at
4 345 (emphasis added). With respect to the creativity/originality of photographs,
5 one court recently explained:

6 Courts have found that photographs, even if taken partly
7 for informative purposes, can still be creative. See,
8 e.g., Balsley v. LFP, Inc., 691 F.3d 747, 760 (6th Cir.
9 2012) (finding that amateur photograph of a wet t-shirt
10 contest had “a mixed nature of fact and
11 creativity”); Kelly v. Arriba Soft Corp., 336 F.3d 811,
12 820 (9th Cir. 2003) (“Photographs that are meant to be
13 viewed by the public for informative and aesthetic
14 purposes . . . are generally creative in nature.”). Even
15 photographs of “mundane articles of furniture” have
16 been found to have a creative nature for copyright
17 purposes. See Ashley Furniture Indus., Inc. v. Am.
18 Signature, Inc., No. 2:11-CV-427, 2014 WL 11320708,
19 at *9 (S.D. Ohio 2014) (“although the copyrighted
20 photographs at issue in this case depict
comparatively mundane articles of furniture, they are at
least as creative as the surreptitious grab shot at issue
in Balsley.”).

15 Maui Jim v. Smartbuy Guru Enters., 459 F. Supp. 3d 1058, 1102 (N.D. Ill. 2020).

16 In that case, the court concluded that the photographs at issue (of Maui Jim
17 sunglasses) were sufficiently creative to meet the minimum threshold: “although
18 the 93 Photographs are mundane depictions of Maui Jim’s sunglasses, we find that
19 the process of creating those photographs necessarily included decisions about
20 lighting, camera angle and distance, shadowing, and post-production editing.

1 Additionally, creative judgment was necessarily exercised in selecting which
2 photographs to use on Maui Jim’s advertisements.” Id.

3 Defendant cannot seriously dispute that the photographs at issue meet the
4 minimum levels of creativity required for copyright registration. The photographs
5 here were taken of well-known celebrities (generally in private/studio settings
6 where general members of the public would not have access), involve complex
7 elements of lighting/staging, and cannot be recreated.²⁷

8 ***b) Copying of Constituent Elements***

9 The copying element of an infringement claim has two components.
10 Madaluxe Grp., LLC v. Kok Han Wee, No. 8:22-cv-01926-WLH-KES, 2025 LX
11 285640, at *11 (C.D. Cal. June 10, 2025). The two components are ‘copying’ and
12 ‘unlawful appropriation.’ See Kim v. Shein Distribution Corp., No. CV 23-8251-
13 GW-JCx, (C.D. Cal. May 17, 2024). “To prove copying, the similarities between
14 the two works need not be extensive, and they need not involve
15 protected elements of the plaintiff’s work. They just need to be similarities one
16 would not expect to arise if the two works had been created independently.”
17 Rentmeester v. Nike, Inc., 883 F.3d 1111, 1117 (9th Cir. 2018). “To prove
18 unlawful appropriation, on the other hand, the similarities between the two works
19

20

²⁷ Grecco Decl., at ¶ 42.

1 must be ‘substantial’ and they must involve protected elements of the plaintiff’s
2 work.” Id.

3 Here, Defendant’s users displayed duplicate copies of Plaintiff’s Work on
4 their profiles/pages on Defendant’s website.²⁸ The screenshots of the respective
5 post (including a profile photo) displaying Plaintiff’s photographs on Defendant’s
6 website unequivocally show Defendant’s end users copying of the Work.²⁹

7
8 *c) Defendant’s Affirmative Defense – Fair Use*

9 Defendant’s fifth affirmative defense is that any alleged infringement of the
10 Work (by its users) constitutes fair use. Setting aside for the moment that
11 Defendant was not itself entitled to consider fair use in availing itself of the DMCA
12 safe harbor, the point remains that Defendant’s assertion of fair use here is both
13 flawed and misguided. “To determine whether a particular use is ‘fair,’ the statute
14 sets out four factors to be considered: (1) the purpose and character of the use,
15 including whether such use is of a commercial nature or is for nonprofit
16 educational purposes; (2) the nature of the copyrighted work; (3) the amount and
17 substantiality of the portion used in relation to the copyrighted work as a whole;
18

19
20 ²⁸ Complaint [D.E. 46], at ¶¶ 12, 14, 16, 18, 20, 22, 24, 26, 28, 30, 32, 34, 36, 38, 40, 42, 44, 46, 48, 50, 52, 54, and Exhibit N.

²⁹ Id.

1 and (4) the effect of the use upon the potential market for or value of the
2 copyrighted work.” See Andy Warhol Found. for the Visual Arts, Inc. v.
3 Goldsmith, 598 U.S. 508, 527 (2023).

4 **1. Purpose and Character of the Use**

5 “The central purpose of this [factor] is to see . . . whether the new work
6 merely ‘supersede[s] the objects’ of the original creation; it asks, in other words,
7 whether and to what extent the new work is ‘transformative.’” Dr. Seuss Enters.,
8 L.P. v. ComicMix LLC, 256 F. Supp. 3d 1099, 1105 (S.D. Cal. 2017) (cleaned up).

9 “Another element of the first factor analysis is whether the work's ‘purpose’ was
10 commercial or had a non-profit aim.” Mattel Inc. v. Walking Mt. Prods., 353 F.3d
11 792, 803 (9th Cir. 2003).

12 In evaluating the first factor, it weighs in favor of Plaintiff. Defendant’s
13 users displayed Plaintiff’s Work. The photographs were not transformed nor
14 unrecognizable. Further, the usage of the Work did not have a non-profit aim. And,
15 whether Defendant actually profited from its display of the Work is not the relevant
16 test. As the Court in Von Der Au v. Michael G. Imber, Architect, PLLC, No. SA-
17 20-CV-00360-XR, 2021 U.S. Dist. LEXIS 55298, at *11 (W.D. Tex. Mar. 24,
18 2021) stated:

19 The parties miss the issue. The Supreme Court has noted
20 that ‘[t]he crux of the profit/nonprofit distinction is not
whether the sole motive of the use is monetary gain but

whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.’ Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 562 (1985). Here, Defendant asserts that the Website, www.michaelgimberblog.com, is intended to be used for educational purposes, while the Defendant promotes its architectural services at a separate website, www.michaelgimber.com. Imber Decl. ¶¶ 2, 4. Even though the Defendant did not produce the Photograph for individual sale or profit, it surely stood to profit indirectly from the publicity gained by publication of a blog that used the Photograph. That is, increased patronage of the blog is likely good for Defendant’s for-profit business, and the use of the Photograph is likely intended to increase web traffic to the blog. Such use is commercial in character.

Setting aside whether Defendant itself profited, Defendant testified that users of its platform can make money by being in the creator fund.³⁰ An unspecified number of users who utilized Plaintiff’s photographs were members of the creator fund.³¹ Defendant’s users certainly had the ability to profit from using Plaintiff’s Work without paying the customary price.

2. The Nature of the Copyrighted Work

“The second factor in the fair use analysis ‘recognizes that creative works are closer to the core of intended copyright protection than informational and functional works.’” Walking Mt. Prods., 353 F.3d at 803 (quoting Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc., 109 F.3d 1394, 1402 (9th Cir. 1997))

³⁰ Alejandrino Decl. at ¶ 3, Exhibit A, at Boutros Tr. at 24:7-24:12.

³¹ Id. at ¶ 3, Exhibit A, at Boutros Tr. at 25:12-26:12.

(internal quotations omitted)). While courts have traditionally found this factor to not be the most heavily weighted in a fair use analysis, this factor would weigh in favor of Plaintiff. The Work is comprised of photographs featuring various celebrities and television show characters. The Work at bar is not factual, but creative.

3. The Amount and Substantiality of the Portion Used

“The third factor looks to the quantitative amount and qualitative value of the original work used in relation to the justification for that use.” Seltzer v. Green Day, Inc., 725 F.3d 1170, 1178 (9th Cir. 2013). The third factor does not support a finding of fair use, either. Defendant’s users utilized substantial portions of the Work that is clearly identifiable from a comparison to the Work.

4. The Effect of the Use Upon the Potential Market

“The fourth fair use factor is ‘the effect of the use upon the potential market for or value of the copyrighted work.’ § 107(4). It requires courts to consider not only the extent of market harm caused by the particular actions of the alleged infringer, but also ‘whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market’ for the original.” Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 590 (1994) (quoting 4 Nimmer on Copyright § 13.05 (2025)). This factor weighs in favor of Plaintiff. Plaintiff strives to be a “boutique high-end licensor of

1 high-quality imagery.”³² Plaintiff is selective about what photographs get licensed
2 and to whom for the purpose of not wanting to undermine the market.³³ Plaintiff
3 has no way to control how its photographs operate in the market when the
4 photographs are being infringed and may lose licensing revenue.³⁴

5 When viewed in totality, the four fair use factors all militate toward a finding
6 in favor of Plaintiff. Defendant’s users use of the Work was not educational, to
7 report on the news, or for any purpose traditionally tied to a fair use analysis. As
8 such, this Court should find that the unauthorized uses of Plaintiff’s photographs
9 were not fair use.

10
11 ***B. Defendant Committed Contributory Infringement***

12 “Although the Copyright Act does not expressly impose liability on anyone
13 other than direct infringers, courts have long recognized that in certain
14 circumstances, vicarious or contributory liability will be imposed.” Fonovisa, Inc.
15 v. Cherry Auction, Inc., 76 F.3d 259, 261 (9th Cir. 1996).

16 “To state a claim for contributory copyright infringement, a plaintiff must
17 allege that the defendant ‘(1) knew of the direct infringement; and (2) [] either
18

19 ³² Id. at ¶ 4, Exhibit B, at Grecco Tr. at 318:19-318:20.

20 ³³ Id. at ¶ 4, Exhibit B, at Grecco Tr. at 321:14-321:25.

³⁴ Id. at ¶ 4, Exhibit B, at Grecco Tr. at 133:12-134:1.

1 induced, caused, or materially contributed to the infringing conduct.” Robinson v.
2 Binello, 771 F. Supp. 3d 1114, 1124 (N.D. Cal. 2025) (quoting Luvdarts, LLC v.
3 AT & T Mobility, LLC, 710 F.3d 1068, 1072 (9th Cir. 2013)).

4 “The first element ‘requires more than a generalized knowledge by the
5 [defendant] of the possibility of infringement. The plaintiff must allege ‘actual
6 knowledge of specific acts of infringement.’” Id. at 1124 (quoting Luvdarts, LLC,
7 710 F.3d at 1072); see also A&M Records, Inc., 239 F.3d at 1021 (cleaned up)
8 (“[I]f a computer system operator learns of specific infringing material available
9 on his system and fails to purge such material from the system, the operator knows
10 of and contributes to direct infringement....”). Where an online provider has actual
11 knowledge of infringement, and could take simple measures to prevent further
12 damage to the copyright holder’s works (e.g., removal of the content), but fails to
13 take those steps, that online provider could be held contributorily liable. See
14 Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1172 (9th Cir. 2007).

15
16 ***a) Defendant had Knowledge***

17 “We have interpreted the knowledge requirement for contributory copyright
18 infringement to include both those with *actual knowledge* and those who *have*
19 *reason to know* of direct infringement.” Ellison, 357 F.3d at 1076.

1 Here, Defendant had actual knowledge. Defendant received compliant
2 DMCA takedown notices and has had every opportunity to comply. Notably,
3 Plaintiff's takedown notices were addressed and submitted to Defendant's
4 designated DMCA email address.³⁵ The takedown notices also provided a direct
5 link to the infringement.³⁶ Pointedly, Defendant has admitted to receiving the
6 notices yet leaving the infringements up for at least a year.³⁷

7 Moreover, [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]. As succinctly stated
11 in Ellison, 357 F.3d at 1076:

12 The district court found that AOL did not have actual
13 knowledge of the infringement before Ellison filed his
14 copyright infringement action ... We agree. AOL
15 changed its contact e-mail address ... in the fall of 1999,
16 but waited until April 2000 to register the change with
17 the U.S. Copyright Office. Moreover, AOL failed to
configure the old e-mail address so that it would either
forward messages to the new address or return new
messages to their senders. In the meantime, complaints
... went unheeded, and complainants were not notified
that their messages had not been delivered. ... Because

18 ³⁵ Alejandrino Decl. at ¶ 3, Exhibit A, at Boutros Tr. at 47:9-47:17; 53:13-53:17; 56:16-56:21;
19 57:14-57:19; 59:9-59:14; 60:5-60:9; 61:1-61:5; 62:6-62:11; 69:15-69:21; 70:18-70:23; 71:16-
71:21; 72:16-72:20; 73:12-73:16; 74:10-74:14; 75:7-75:11; 76:4-76:8; 76:24-77:3; 77:22-77:25;
78:16-78:20; 79:8-79:13; 80:6-80:10; 81:3-81:7; 81:25-82:4; 82:22-83:2; Grecco Decl., at ¶ 35.

20 ³⁶ Grecco Decl., at ¶ 36.

³⁷ Alejandrino Decl., at ¶ 5, Exhibit C, No. 9-13.

there is evidence indicating that AOL changed its e-mail address in an unreasonable manner and that AOL should have been on notice of infringing activity we conclude that a reasonable trier of fact could find that AOL had reason to know of potentially infringing activity occurring within its USENET network.

Defendant *should* have known about the infringements.

³⁸ Id. at ¶ 3, Exhibit A, at Boutros Tr. at 44:15-44:21.

³⁹Id. at ¶ 3, Exhibit A, at Boutros Tr. at 64:9-65:21; Id. at ¶ 6, Exhibit D, No. 12.

⁴⁰ *Id.* at ¶ 3, Exhibit A, at Boutros Tr. at 64:9-65:21.

⁴¹ Id. at ¶ 3, Exhibit A, at Boutros Tr. at 117:1-118:24

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED] Defendant
5 should have been on notice of infringing activity.

6 Even if the Court is not inclined to find that Defendant should have known
7 of the infringements, or that the takedown notices conferred actual knowledge,
8 Defendant's actual knowledge is established by the service of the Complaint.
9 Defendant was served the Complaint on June 14, 2024.⁴² The Complaint contains
10 screenshots and links to the infringing materials. Defendant testified that it
11 received notice of this lawsuit. [REDACTED]

12 [REDACTED]
13 [REDACTED]⁴³ Evidently, Defendant believed it should not remove the content.
14 Defendant has been on notice about the infringements for well over a year and has
15 deliberately and consistently chosen not to comply with the DMCA requirements.
16 Thus, it is indisputable that Defendant has actual knowledge.

17
18
19 _____
⁴² Proof of Service [D.E. 11].

20 ⁴³ Alejandrino Decl. at ¶ 3, Exhibit A, at Boutros Tr. at 19:23-20:5; 94:7-94:20; 111:21-112:4;
112:10-17; 125:23-126:8; 127:1-127:8; Alejandrino Decl. at ¶ 6, Exhibit D, No. 12.

1 ***b) Simple Measures***

2 “To prevail on its contributory copyright infringement claim, Plaintiff must
3 also demonstrate that [a service provider could] ‘take simple measures to prevent
4 further damage to copyrighted works, yet continued to provide access to infringing
5 works.’ In other words, Plaintiff must show that [the service provider] could have,
6 and failed to take simple measures to block access to the infringing images on [its
7 platform].” Als Scan v. Cloudflare, Inc., No. CV 16-5051-GW (AFMx), at *27
8 (C.D. Cal. Mar. 30, 2018) (cleaned up).

9 The ability for a service provider to take simple measures is predicated on
10 knowledge of the infringing work. Stross v. Twitter, Inc., No. 2:21-cv-8360-SVW,
11 (C.D. Cal. Feb. 28, 2022). Where defendant has knowledge of the infringing works,
12 takedown notices providing links to the infringing material constitute simple
13 measures. Id. As explained herein, Defendant had actual knowledge of the
14 infringements. Moreover, Plaintiff’s takedown notices contain direct links to the
15 infringing material.⁴⁴ See Stross, No. 2:21-cv-8360-SVW, (C.D. Cal. Feb. 28,
16 2022) (finding that the service provider had the ability to take simple measures
17 because the takedown notices provided links to the infringing materials).

18
19
20

⁴⁴ Grecco decl. at ¶ 36.

1 Additionally, [REDACTED]

2 [REDACTED].⁴⁵ [REDACTED]

3 [REDACTED].⁴⁶ Contra Perfect 10, Inc. v.
4 Giganews, Inc., 847 F.3d 657 (9th Cir. 2017) (holding that there were no simple
5 measures available to remove the works because the generalized takedowns
6 required spending more than 20 hours processing 565 Message-IDs which was
7 onerous and unreasonably complicated). That Defendant [REDACTED]

8 [REDACTED]
9 [REDACTED] was provided direct links to the infringing content vis-à-vis Plaintiff's
10 takedown notices, Defendant had simple measures to remove the infringing
11 content... and still decided not to.

12 ***c) Defendant Materially Contributed***

13 “The second element a plaintiff must prove to succeed on a claim of
14 contributory copyright infringement is that the defendant materially contributed to
15 another’s infringement.” Ellison, 357 F.3d at 1077. “As for material contribution,
16 Ninth Circuit authority instructs that actual knowledge automatically establishes a
17 ‘material contribution’ theory of contributory infringement.” BackGrid USA, Inc.
18 v. Twitter, Inc., No. CV 22-9462-DMG (ADSx) at *11 (C.D. Cal. June 7, 2024).

19 _____
⁴⁵ Alejandrino Decl. at ¶ 3, Exhibit A, at Boutros Tr. at 17:16-24; 30:12-20.

20 ⁴⁶ Id. at ¶ 3, Exhibit A, at Boutros Tr. at 16:14-16:16; 17:16-17:24; 30:12-30:20; 31:13-31:25;
124:2-124:22; 125:22-126:7.

1 In this case, as explained herein, Plaintiff has established Defendant’s actual
2 acknowledge. As such, a material contribution is automatically established.

3 Alternatively, Defendant’s actions and refusal to comply with its
4 requirement under the DMCA constitute a material contribution. “Applying Sony
5 to the Internet context, we held ... that ‘if a computer system operator learns of
6 specific infringing material available on his system and fails to purge such material
7 from the system, the operator knows of and contributes to direct infringement.’”
8 UMG Recordings, Inc., 718 F.3d at 1021 (quoting A&M Records, Inc., 239 F.3d
9 at 1021); See also Ventura Content, Ltd. v. Motherless, Inc., 885 F.3d 597, 604
10 (9th Cir. 2018) (“A service provider must delete or disable access to ... material
11 for which he receives a statutorily compliant takedown notice.”). Defendant
12 learned of infringing content on its platform/system (whether from Plaintiff’s
13 DMCA takedown notices or the Complaint) and *failed* to purge the material from
14 its system or disable access to the content (a failure that is ongoing). Defendant
15 therefore knows of and continues to contribute to direct infringement.

16 Additionally, “operating a service that allows for the posting of infringing
17 material satisfies the requirement for substantial involvement.” See BMG Rts.
18 Mgmt. (United States) LLC v. Jooy Inc., 716 F. Supp. 3d 835, 843 (C.D. Cal.
19 2024). Defendant operates a platform that allows for the posting of infringing
20 material. As already illustrated, Defendant, at the very least, had reason to know

1 about the infringing activity, yet took no action on said knowledge. And, rather
2 than comply with its requirements under the DMCA, [REDACTED]

3 [REDACTED].⁴⁷

4 Moreover, by conducting a fair use analysis (rather than simply removing
5 the material and providing its user the opportunity to engage in the ‘put-back
6 procedures’), Defendant involved itself in the matter and released any pretense of
7 neutrality afforded to service providers. In other words, Defendant’s actions
8 constitute a substantial participation in the infringement. *Id.* (“A third party can be
9 liable for materially contributing to infringement only where its participation in the
10 infringing conduct of the primary infringer is substantial.”). Consequently,
11 Defendant’s actions after receiving notice of the infringement—in direct defiance
12 of the DMCA—constitute material contribution.

13 CONCLUSION

14 For the foregoing reasons, Plaintiff respectfully request that the Court enter
15 an Order: (a) granting partial summary judgment in favor of Plaintiff with respect
16 to secondary liability on its claim for contributory copyright infringement
17 (including finding that Plaintiff’s DMCA takedown notices were compliant,
18
19

20 ⁴⁷ *Id.* at ¶ 3, Exhibit A, at Boutros Tr. at 19:23-20:5; 94:7-94:20; 111:21-112:4; 112:10-17;
125:23-126:8; 127:1-127:8; Alejandrino Decl. at ¶ 6, Exhibit D, No. 12.

Defendant's users committed direct infringement, and that fair use does not apply);⁴⁸ and (b) for such further relief as the Court deems proper.

LOCAL RULE 7.3 CERTIFICATE

Before filing this Motion, undersigned counsel conferred with counsel for Defendant on August 15, 2025. Defendant opposes this motion.

Dated: August 22, 2025.

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Attorney for Plaintiff

⁴⁸ The sole remaining issue for trial on Plaintiff's claim for contributory infringement would thus be damages.

1 By: /s/ Lauren M. Hausman
2 Lauren M. Hausman, Esq.

3
4 **CERTIFICATE OF SERVICE**

5 I hereby certify that on August 22, 2025, I electronically filed the foregoing
6 document with the Clerk of the Court using CM/ECF, which will electronically
7 serve all counsel of record.

8 /s/ Lauren M. Hausman
9 Lauren M. Hausman, Esq.
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